Supreme Court, U.S.
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No. 90-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEMAN M. COOPER,
Petitioner,

VS.

WILLAMSON COUNTY BOARD OF EDUCATION,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Do the pre-termination hearings afforded the Petitioner before the School Board and Chancery Court meet the requirements of the Due Process Clause of the United States Constitution?

2. Were the pre-termination proceedings in this case so unfair as to overcome the facts justifying the Petitioner's dismissal?

PARTIES TO PROCEEDINGS BELOW

The statement submitted by the Petitioner on page ii regarding the parties to the proceedings below is correctly stated with no additions or corrections stated thereto by the Respondent.

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RESPONDENT'S BRIEF IN OPPOSTION

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petitioner was afforded more than the basic process due him prior to his dismissal as a tenured teacher from the Williamson County School System.

Examined factually, the Circuit Court cases cited by the Petitioner do not show a split in the due process requirements of pre-termination procedures as set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Inadequate proof exists in this record to show that the entire twelve member School Board was so biased and prejudiced as to nullify the entire proceedings on Constitutional grounds.

The Tennessee Supreme Court remanded the case to Chancery Court to allow the Petitioner *further* opportunities to present his case while on suspension. After examining the facts on a second appeal, the Court was justified in finding that the Petitioner's dismissal was supported by a preponderance of the evidence and that all procedural and substantive due process requirements had been met.

OPINIONS BELOW

This case has been before the Tennessee Supreme Court twice. *Cooper v. The Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987), is correctly reprinted at Appendix C of the Petitioner's Writ, pages A-19 through A-32. It is hereinafter referred to as *Cooper I*.

The second appeal to the Tennessee Supreme Court, *Cooper v. Williamson County Board of Education*, 803 S.W.2d 200, was decided on September 17, 1990. Petitioner's request for a re-hearing was denied on November 13, 1990. The second Tennessee Supreme Court decision is correctly reprinted at Appendix A of Petitioner's Writ, pages A-1 through A-12. It is hereinafter referred to as *Cooper II*. The denial of a rehearing is correctly reprinted on page A-39 in Petitioner's Appendix.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

After the Petitioner (Cooper) was dismissed by the Williamson County Board of Education (Board), he appealed his dismissal to the Chancery Court of Williamson County, Tennessee. That matter was tried before Chancellor Bell on November 5, 1986. A memorandum opinion issued from that trial on January 5, 1987, sustaining the Board's action in dismissing Cooper. (See Appendix B to Petitioner's Writ). The case was appealed directly to the Tennessee Supreme Court pursuant to T.C.A. 49-5-513(i). That Court found in favor of the Board on the issue

of the Tennessee Open Meetings Act violations, T.C.A. 8-44-101, *et. seq.*, and on the issue that Cooper was denied due process of law. (See Appendix C to Petitioner's Writ). The Tennessee Supreme Court remanded the matter back to Chancellor Bell for a new hearing on the merits after it opined that the Chancellor's method in hearing the case deprived Cooper of his right to a hearing *de novo* under the statutory scheme set forth in T.C.A. 49-5-513. *Cooper I.*

The case was tried a second time on December 13 and 14, 1988. On January 24, 1989, Chancellor Bell issued a second memorandum opinion again sustaining the action of the Board in dismissing Cooper from the System. (See Appendix D to Petitioner's Writ). The matter was appealed again to the Tennessee Supreme Court pursuant to T.C.A. 49-5-513(i). That Court decided the case in favor of the Respondent finding that Petitioner had been afforded the necessary *de novo* review, due process had been met, and the Board proved its case by the required preponderance. A Petition for re-hearing was subsequently denied. *Cooper II.* (See Appendix A to Petitioner's Writ and page 39 of the Writ).

FACTUAL HISTORY

The Board does not dispute the facts stated in Cooper's Petition regarding his length of service as a teacher with the Board nor does it contest his tenure status and the fact that he became a principal for the Board pursuant to the order of U. S. District Judge Thomas Wiseman in a Title VII action filed by Cooper. *Cooper v. Williamson County Board of Education. et al*, No. 3-80-3393. However, considerable additions and/or corrections are supplied here to supplement and clarify the Statement of Facts filed by Cooper.

Cooper began his Fairview High principalship in the fall of 1984. His refusal to cooperate began early on in his principalship there.

On September 4, 1984, Cooper requested Fleming's attendance at Fairview High School but refused to tell Fleming, upon inquiry, why he wanted him there the following day. (D.C. Tr. p. 730, 11. 10-23). It was not until Fleming arrived at school the next day that he learned that Cooper wanted him to speak to the faculty and staff. Fleming then asked Cooper what was to be the subject on which he was to address the faculty. (D.C. Tr. p. 731, 11. 2-22). Only at Flemings's insistence did Cooper state that he had received several reports that members of the faculty were encouraging student walkouts. (D.C. Tr. p. 732, 11. 1-6). Fleming asked for the names of the specific teachers so those teachers could be addressed rather than the entire faculty. Cooper refused to give Fleming any of the teachers' names. (D.C. Tr. p. 732, 11. 6-22). Fleming, despite lack of notice, spoke to the faculty and staff. Cooper then praised Fleming in front of the faculty for the manner in which he handled the situation. Cooper later filed an EEOC complaint against Fleming complaining of the manner in which Fleming handled the meeting. (D.C. Tr. p. 734, 1. 5 to p. 735, 1. 22; pp. 23-25; p. 736, 11. 3-5; p. 527, 11. 5-8).

Upon learning on November 7, 1984, that the students had exited the school, Fleming immediately went to Fairview High School to check on the situation. (D.C. Tr. p. 530 1. 25). Finding the students back in the building and generally orderly, Fleming sent for Cooper, who was attending an optional Principal's meeting, asking that he return to the school so that he could assist in dealing with student concerns. (D.C. Tr. p. 532 11. 4-21). During and after this incident, Fleming reminded the students at Fairview High that Cooper was the principal of the school and they must so recognize him. (D.C. Tr. p. 531, 11. 12-16).

On that evening of November 7, 1984, Cooper granted an interview with Ralph Dawson of **THE NASHVILLE TENNESSEAN** and in it Cooper publicly blamed the student walkout on the faculty, a fact he later denied and then subsequently affirmed. (D.C. Tr. pp. 746, 1. 6-p. 757, 1. 10).

In the midst of the turmoil that occurred at Fairview on November 7, 1984, and the two days following, Cooper announced to Fleming that he had previously requested leave for the following two days and that he would not be at school. (D.C. Tr. p. 741, 11, 15-25). Fleming reminded Cooper of the seriousness of the situation at the school and that none of it had been contemplated when the leave request had been submitted. He stressed to Cooper the need to be present the next day. (D.C. Tr. p. 742, 11. 1-13). Cooper insisted that he had to be away. Finally, in response to a telephone call to Cooper's home that night, Cooper reluctantly agreed to be at the school the next morning. (D.C. Tr. p. 747, 1. 19-p. 748, 1. 13).

Against this factual backdrop, charges were initially brought against Cooper before the Board in January of 1985. They were the subject of a multi-night hearing that ended on April 1, 1985. The charges were dismissed by the Board and Cooper remained as the principal of Fairview High School. All parties were admonished by the Board's Chairman to work together for the success of Fairview High. (D.C. Tr. pp. 372-378).

MANAGEMENT ACTION PLAN

A management action plan (M.A.P.) was requested by Board Member Neil at the conclusion of the first hearing. He stated that its purpose was to assist Cooper. (D.C. Tr. p. 351,1. 12-p. 352, 1.4). Cooper had never been a high school principal. (D.C. Tr. p. 254, 11. 9-19).

When the M.A.P. was finally approved on August 7, 1985, Fleming instructed Cooper to distribute it to the Fairview High faculty. (R. Exhibit 1., p. 50, 11. 11-16). After several written directives were sent from Fleming to Cooper to distribute the M.A.P. to the faculty, Cooper told Fleming on October 25, 1985, that he would distribute the M.A.P. to the faculty within 10 minutes to 30 days after he returned to work from sick leave. (R. Exhibit 1, p. 52, 1. 21-p. 53, 1. 11). Cooper finally distributed the

M.A.P. to his faculty on November 19, 1985, after having received eleven different instructions to do so. (R. Exhibit 1, p. 53, 11. 16-21; p. 54, 11. 3-5).

Cooper was required to provide to the Superintendent a report of his progress on the M.A.P. so that Fleming could incorporate that into his report to the Board for the October 14, 1985, meeting. (R. Exhibit 1, p. 42, 11. 18-24). Fleming never received a report from Cooper for that meeting, nor for the Board meeting of October 21, 1985, or November 6, 1985. (R. Exhibit 1, p. 43, 1. 21-p. 44, 1. 5). Fleming did not see Cooper's report, much of which pertained to routine matters and sketches of cheerleader jumps rather than material required by the M.A.P., until Cooper submitted it to the Board on November 25, 1985. (R. Exhibit 1, p. 44, 1. 19-p. 45, 1. 2; see additional Exhibit B.1 submitted by Cooper in his Offer of Proof). Prior to the submission of this report to the Board, and during the time Fleming requested Cooper's input, Cooper, while on sick leave, delivered to **THE NASHVILLE TENNESSEAN** a lengthy press release which constituted his response to Fleming's bi-monthly report. (R. Exhibit 1, p. 45, line 1-9; p. 47, line 21).

SICK LEAVE

From the time of April 1, 1985, until November 25, 1985, Cooper missed 67 work days. He does not dispute those figures. (R. Exhibit 1. p. 17, 11. 3-5, p. 361, 11. 20-p. 352, 1. 1).

Questions about the status of his health and requests for specific information about his health were made in writing on April 22, 1985, November 7, 11 and 13, 1985, (R. Exhibit 1, p. 18, 11. 2-25), and verbally on April 10, 16, and 29, and November 6, 1985. (R. Exhibit 1,pp. 19-20; pp. 31, 1. 19-p. 33, 1. 10). Cooper was admitted to the hospital in the spring of 1985, under an assumed name and the first time the Board heard from Cooper's doctor in person, or heard any specific reasons from his doctor for his absences, was in preparation for the Contempt of

Court hearing (filed by Cooper) in Federal Court in May of 1986. (12-13-88 Tr. p. 184).

In the midst of his sick leave in October, 1985, Cooper took two personal leave days and went to Columbia, Tennessee. (R. Exhibit 1, p. 21 11. 3-17; p. 464, 11. 6-24). Earlier, Cooper had notified Fleming that he--Cooper--would be out until further notice or after his re-examination on June 7, 1985. Two days before the June 7th re-examination deadline, Cooper attended a career-ladder seminar at Brentwood High School in order to qualify for a $1,000.00 salary supplement. (R. Exhibit 1, p. 29, 1. 5-p. 30, 1. 5). Finally, while Cooper did not attend graduation at Fairview High on June 4, 1985, claiming ill health, he did attend the aforementioned career-ladder seminar the next day. (R. Exhibit 1, p. 377, 1. 7-p. 378, 1. 10).

The Board first learned that Cooper had been seen by Dr. Jordan, a psychiatrist, in 1985, when his physician (Dr. Alexander's) deposition was taken in April of 1986. (12-13-88 Tr. p. 248). Dr. Jordan did no psychological testing. (12-13-88 Tr. p. 248). He did, however,find that in the spring of 1985 Cooper was stable, emotionally secure, a gentlemen who was functioning quite well from a psychological standpoint. (12-13-88 Tr. p. 231).

Dr. Jordan further noted and submitted in a written report the following:

> "However, he indicates he has an interest in removing himself from the school system as soon as possible. As you know, he's an ordained minister in the African Methodist Episcopal Church and has pastored in the past. He says that he is going to contact his bishop and make known his availability, such that, when he can be given an appointment which he feels is comfortable to his needs, he will resign from the school system and go into an active full-time ministry. He has indicated an interest in doing this as of the summer of 1986.

(12-13-88) Tr. p. 246). Dr. Jordan felt that this was a good plan for Cooper. (12-13-88 Tr. p. 238). Cooper's previously expressed desire to leave the school system (as he had stated earlier to Dr. Jordan) spawned settlement discussions in August, 1985, that were initiated by his attorneys. (12-13-88 Tr. p. 342).

RESPONSE TO ORAL AND WRITTEN DIRECTIVES

On October 11, 1985, Fleming contacted Cooper about meeting for a Board/State required principal evaluation conference. (R. Exhibit 1, p. 73, 11. 16-21). Cooper told Fleming he would not meet with him. (R. Exhibit 1, p. 177, 1. 9-p. 178, 1. 5). Fleming contacted Cooper on October 18, 22, 25, 1985, and November 11, 1985, trying to schedule the evaluation conference. (R. Exhibit 1, p. 73, 1. 21-p. 75, 1. 4). The conference was finally held on November 19, 1985. (R. Exhibit 1, p. 75, 11. 1-4).

At the conclusion of a meeting on October 9, 1985, between Cooper, Fleming, Jan Daugherty, a teacher at Fairview High and her representative, Walt Olsen, Fleming directed Cooper to remove from her personnel file a written reprimand that Cooper had issued to Daugherty. (R. Exhibit 1, p. 60, 1. 21-p. 61, 1. 3). Fleming issued a written notice on October 10, 1985, to Cooper following up on the previous oral directive. (R. Exhibit 1, p. 61, 11. 10-14). Fleming established a deadline of October 16, 1985, for Cooper to respond to the oral and written directives. (R. Exhibit 1, p. 6, 1. 23-p. 62, 1. 1). On October 25, 1985, and November 6, 1985, Cooper told Fleming that he had not decided whether he would comply with Fleming's directives to remove the reprimand. (R. Exhibit 1, p. 62, 11. 9-13; p. 62, 11. 16-20). On November 18, 1985, Cooper told Fleming that he had pulled the reprimand from Daugherty's file. During the dismissal hearing, Cooper stated that he had actually removed the reprimand from Daugherty's file immediately upon return from the October 9th meeting. (R. Exhibit 1, p. 62, 1, 21-p. 63, 1. 21).

During the a meeting between Fleming and Cooper on April 8, 1985, a discussion occurred between the two concerning the filling of a vacancy for a math position at Fairview High. The two discussed this subject before, and Fleming had already told Cooper that he had, upon recommendation of the secondary supervisor, Arthur Vosburgh, rejected Cooper's recommendation of one Roosevelt Harvey. When Fleming asked Cooper if he was going to recommend someone other than Harvey for the position (which is required of principals when recommendations are rejected) Cooper refused to state whether he would recommend someone other than Harvey by the April 23, 1985, deadline established by Fleming. Who Cooper was to recommend other than Harvey was up to Cooper. (R. Exhibit 1, p. 69, 11. 11-16). Cooper did not make his recommendation to Fleming until May 13, 1985. On that date he recommended Roosevelt Harvey. (For entire discussion of this issue, see R. Exhibit 1, p. 66, 1. 12-p. 73, 1. 11; D.C. Tr. p. 672, 1. 15-p. 680, 1. 13; D.C. Tr. Exhibit 11).

Cooper admitted in the second trial that he was not confused about Fleming's directives on the Daugherty and Harvey issues. (12-13-88 Tr. p. 456).

Cooper received a request from Robert Cullen to supply to Cullen by October 16, 1985, a plan for having all teachers assigned to their areas of certification by the 1986-87 school years. (R. Exhibit 1, p. 277, 1.22-p. 278, 1.2). Another reminder was sent to Cooper on December 11, 1985, Cullen received the report on December 17, 1985. (R. Exhibit 1, p. 278, 11.2-11).

Fleming could never finish a task or assignment in trying to work with Cooper without the attempt becoming a major production. (R. Exhibit 1, p. 188, 1. 18-p. 189, 1. 1; p. 191, 1. 21-p. 192, 1. 7). It was equally difficult to get Cooper to respond in a straightforward manner. (R. Exhibit 1, p. 413, 1. 25-p. 414, 1. 24). Fleming did not experience similar difficulty with other principals in obtaining satisfactory responses to his requests. (R. Exhibit 1, p. 167, 11. 3-10).

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF TENNESSEE IS NOT IN CONFLICT WITH THE *LOUDERMILL* DECISION

Petitioner relies heavily upon *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, (1985), as grounds for submitting that Petitioner's due process rights have been violated. A *Loudermill* argument in this case is misplaced. Factually, the differences between *Loudermill* and the instant case are glaringly obvious. *Loudermill* was dismissed from public employment because he had lied on his employment application. He was then given notice of a hearing *post*-termination. An Ohio statute created a property right in public employment for Loudermill, and this Court found that that property right could not be taken without an opportunity to respond to charges against that employee *before* his dismissal.

In this case, written charges were presented to Mr. Cooper prior to his dismissal on those charges. A lengthy hearing occurred wherein proof supporting those charges was first presented with extensive cross-examination of witnesses testifying in support of the charges. Mr. Cooper had the opportunity to present his side of the story. *Then* the Board voted on the charges. This notice and hearing was all *pre*-termination. Therefore, on its face, there is no factual similarity between the lack of due process protection in *Loudermill*, and the due process provided to Cooper before his dismissal.

The Tennessee Courts are not without sensitivity to due process claims and fundamental fairness when it comes to dismissing public school teachers. The case of *Turk v. The Franklin Special School District* at 640 S.W. 2d 218 (Tenn. 1982), is illustrative of Tennessee's concern for these issues. In

that case, Ms. Turk was charged with DUI while off duty and the Superintendent of the School System subsequently read about it in the newspaper. He then called Ms. Turk to his office and gave her two choices: (1) relinquish tenure and accept probationary status and counseling for what the Superintendent had concluded was an alcohol problem; (2) resign her position as a tenured teacher. Ms. Turk declined both offers and the Superintendent then filed charges against her.

When Ms. Turk was brought in for the Board hearing, matters were brought up which did not appear in the written charges that had been submitted to her. The same Chancellor that decided *Cooper I* and *Cooper II* ruled that Ms. Turk was not given a fair hearing because matters were brought up for which she was given no notice. He then made an independent finding that if the extraneous matters had been in the written charges, they would not have adversely affected her ability to teach in the public school system in Franklin, Tennessee. The Tennessee Supreme Court opined, upon appeal, that --

> "We are of the opinion that it was fundamental error for the Board to consider the June, 1979, accident, or her absentee record, or the Superintendent's charge that she had an alcohol problem that required her acknowledgment of same and treatment therefor, because those charges were not specified in writing prior to the hearing." At p. 220.

Under any definition, the aforementioned proceedings did indeed fail to provide the adequate due process to Ms. Turk.

It is significant to note that the statutory scheme in Tennessee under the Tenure Act further states that after a school board has made a decision and the teacher appeals the case to Chancery Court,

> "the filing of such Petition *shall suspend the Order of the Board* pending a decision by the Chancellor, but the teacher

> shall not be permitted to return to teaching pending final disposition of the appeal." T.C.A. 49-5-513(e) (Emphasis supplied).

Thus, it can be argued that the hearing before the Chancellor is *pre*-termination. The due process afforded to Freeman Cooper, and any other teacher in Tennessee under its Teacher Tenure Act, is more than adequate to meet the guarantees of the United States Constitution, *Loudermill*, and its progeny.

Petitioner further contends that under the tenure scheme stated in T.C.A. 49-5-513, and the *de novo* judicial review provisions contained therein the slate is not wiped clean when the matter is heard by the Chancellor. His "cold tater" argument ignores the plain language of the statute, strips the Chancellor of any vestige of a presumption of honesty and good faith, and attempts to stretch the requirements of due process beyond constitutional mandates. Whereas Ohio statutes did not clearly outline in *Loudermill* the process that is due once a property right is established, Tennessee's Teacher Tenure Act establishes due process in terms and amounts that far exceed the minimum requirements.

II

THE PETITIONER HAS NOT ESTBLISHED THAT THE BOARD ACTED IN A MANNER SO AS TO RENDER IT BIASED OR PREJUDICED IN CARRYING OUT ITS STATUTORY DUTIES IN RELATION TO THE DISCHARGE OF COOPER

The Petitioner refers this Court to the cases of *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977), *cert. denied*, 434 U.S. 907 (1977), and *Miller v. City of Mission, Kansas*, 705 F.2d 368 (10th Cir. 1983), in an effort to demonstrate that the Board in this case was biased and prejudiced and therefore did not provide Cooper with a fair hearing. These cases are helpful in defining what constitutes bias or prejudice in connection with termination hearings,

for in each case, the Court rendered its decision based upon specific facts which gave rise to an unfair hearing.

In *Staton*, supra, the Tenth Circuit held that a Board decision to terminate a school superintendent was unfair where Board members expressed their desire to fire the superintendent prior to the dismissal hearing. The Petitioner summarizes the crucial facts stating that "prior to the Board hearing, several of the Board members had voiced their views that a new superintendent was needed." (Petition at p. 19) In reality, the facts demonstrated that before the decision to dismiss Staton, two members of the five member Board had voted not to renew the superintendent's contract and one member had made public statements in the media during his campaign for election to the Board, that it was his opinion and the opinion of the two other members "that no progress could be made with school problems until there was a new superintendent." At p. 913.

The initial written communication from the Board to Staton announced, "The Muskogee School Board District I-20 has voted to dismiss you as Superintendent of Schools for said District." At p. 910, Footnote 1. The letter was described as "a notice of the proposed dismissal" and the charges contained therein were detailed as "willful neglect of duty and incompetency" without further elaboration. The letter advised Staton of the date of a hearing on the "proposed dismissal."

The hearing was conducted as scheduled. Staton appeared with counsel and witnesses. Only four of the five members of the Board were present at the concluding session of the hearing. Of the four, the three who had expressed previous intent to remove Staton voted for his dismissal. In distinguishing this case from *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court concluded that this was not "simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges." At p.914. On the basis of the facts outlined above, the Court held, "We are

convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of these circumstances." At pp. 914-915.

In *Miller v. City of Mission, Kansas, supra*, the only hearing afforded to Miller was a post-termination hearing. Miller was an assistant police chief. A newly elected mayor called several closed meetings of the city council which were not announced to the public and which took place in private homes. At those meetings, it was decided that Miller would be discharged. Later, Miller was summoned to meet with the mayor and was informed that he was being terminated. The city attorney advised him that he was entitled to a hearing. After the meeting but before the hearing, the mayor publicly announced Miller's termination in press releases. Thereafter, Miller received a letter listing seven reasons for his termination and again informing him that he was entitled to a hearing. Miller requested and received a hearing several months later. At the hearing, Miller received a list of additional reasons for termination. The mayor refused to reinstate Miller after the hearing.

The Tenth Circuit affirmed that part of the District Court's decision which held that Miller had been denied procedural due process. At p. 372. In its affirmance, the Court specifically noted that the hearing officer's own testimony supported the trial court's conclusion that "the public hearing was unfair because the hearing officer 'had a prejudiced mind when he went into the case.'" At p. 372.

The Petitioner's reliance upon *Staton* and *Miller* as being directly applicable to the facts of this case is misleading. Both decisions support the essential principle that due process in the instance of deprivation of a property right requires notice and a meaningful opportunity to respond. However, the findings of *Staton* and *Miller* are patently different from the findings in this case because the facts are so drastically different. In *Staton* and

Miller, the public employee was not given notice of the charges against him or the opportunity to respond prior to the decision to terminate him. As such, the hearings in these cases scarcely can be termed "pre-deprivation hearings."

The Petitioner argues that two or three members of the Board had opinions regarding Cooper and his work prior to the hearing on the charges. The opinions were developed from their knowledge of Cooper and his work which was obtained in their capacity as Board members. More importantly, the Petitioner does not mention the state of mind of the remaining members of the twelve person Board. He imputes the possible bias of two or three members to the entire Board without any factual proof or basis for supposition.

In *Staton*, a significant number of the voting Board members (three out of four) had expressed through prior votes or public statements, their intent to remove the school superintendent before the board hearing. The Petitioner desires to equate this conduct, to the actions of, at most, two or three persons of a twelve person Board who indicated before the hearing their displeasure with the performance of Cooper. The Petitioner ignores the statutory mandate placed upon the Board to review proposed charges as to their nature prior to receiving those charges and notifying the employee. T.C.A. 49-5-511(5). (See Appendix 48 of Petition.)

The Court in *Miller* held, based upon the testimony of the hearing officer, that the sole decisionmaker was prejudiced before the hearing. Therefore, the "tribunal" was prejudiced and the due process requirement of a meaningful opportunity to respond was not met. These findings are not reflected in the Petitioner's restatement of the case that "the Tenth Circuit once again held that where the testimony of *members* of a decision-making tribunal shows that those *members* had prejudiced minds before the beginning of the hearing, the hearing must be found to be unfair." At p. 20 (Emphasis supplied). This

case shows that Cooper received a full evidentiary hearing before a *twelve* person Board.

The decisions in *Staton* and *Miller* do not indicate that the employee in those cases had any opportunity for review following the decision of termination. The *Staton* Court states that the Board's decision was final while in *Miller* the Court indicates that the mayor may have had the final authority to affirm the prior decision to terminate or to reinstate the employee after the hearing. The procedures followed in these cases are not at all similar to the *de novo* judicial hearing afforded Cooper after the full evidentiary hearing before the Board. In the absence of such due process guarantees, the Court in *Staton* and *Miller* would closely scrutinize the demeanor of members of the Board (*Staton*) and the mayor (*Miller*) where those decisionmakers have final authority. As such, the Courts' rulings in these cases rested on two main points: the absence of an impartial tribunal and the lack of a hearing *before* termination. Neither of these factors are present in this case.

In the case of *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, (1976), this Court set forth the proposition that--

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker... Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' At p. 493 (Citations omitted)

In that case, the discharged teachers argued that the Board members "had some personal or official stake in the decision whether the teachers should be dismissed, ... and that the Board has manifested some personal bitterness toward the teachers..."

At p. 491. This Court found that the teachers did not demonstrate and the Wisconsin Courts did not find that Board members "had the kind of personal or financial stake in the decision that might create a conflict of interest." At p. 492. In the absence of any findings in this regard and with "nothing in the record to support charges of personal animosity," (at p. 492), this Court applied the above stated proposition to the facts and reversed the holding of the Wisconsin Supreme Court that the school board "was not sufficiently impartial" to render a decision to terminate the teachers. (At pp. 486-487).

Here the Petitioner claims a due process violation because the Board voted to pay the Superintendent's legal fees to bring the charges and because some of its members had opinions about the Petitioner's fitness for the job.

The Superintendent in this case was attempting to fulfill his duties as the Board's administrative head and "Recommender" of personnel matters. See T.C.A. 49-2-301(10). In this light, the Board chose not to make him proceed at *personal* financial loss. Moreover, Fleming's need for legal assistance and his concern for proceeding without it proved all too real. After presenting the charges against Cooper, and the Board voting to dismiss him, Fleming successfully withstood a frontal contempt of court assault by the Petitioner in the Federal District Court for the Middle District of Tennessee. More importantly, however, the Board had dismissed charges against Cooper brought by the same Superintendent less than a year earlier. This record, therefore, does not contain a "specific demonstration of partiality", *Withrow v. Larkin*, supra., or "actual risk of bias or prejudgment", *Id.* The hearing afforded the Petitioner was "meaningful" by every definition of the word. He lost, but the hearing procedures and Tennessee's statutory scheme under which the Board proceeded were and are constitutional.

The Petitioner raised the elements of financial interest and personal animosity in his appeal to the Tennessee Supreme

Court. In its holding, the Tennessee Supreme Court referred directly to *Hortonville*, supra., in stating, "It is axiomatic that due process requires the opportunity of the party charged to be heard at a meaningful time and in a meaningful manner, before an impartial tribunal." Petition at p. A-5. The Court made a specific finding on the issue of bias or prejudice on the part of the Board in the pre-termination hearing. In line with *Hortonville* and *Loudermill*, the Court concluded:

> In our opinion, without question, plaintiff had a meaningful hearing in a meaningful manner before an impartial tribunal in this case, both before the Board and in the *de novo* hearing before the chancellor and there was no violation of his right to due process. Petition at p. A-6.

The Petitioner cites *Moore v. Warrick Public School District No. 29*, 794 F.2d 322 (8th Cir. 1986), for the proposition that he possessed a substantive due process right. According to Petitioner, the Court in *Moore*, relying on *Harrah Independent School District v. Martin*, 440 U.S. 194, (1979), concluded that "a teacher had a substantive due process right to be free from arbitrary and capricious Board action." (Petition at p. 20)

While the *Harrah* decision makes reference to the Due Process Clause as protecting "substantive aspects of liberty against impermissible governmental restrictions," it reversed the Tenth Circuit Court of Appeals decision that a school board had acted in a manner "arbitrary" and "capricious" so as to violate "Fourteenth Amendment notions of fairness embodied in the Due Process Clause..." At p. 197. In reversing, this Court found that the actions of the Board in demanding continuing education units from the teacher and in declining to renew her contract when she refused to enroll in the courses, were well within its responsibility for the public education of students and for employing teachers and were not arbitrary and capricious. This Court also found that by being advised of the Board's decision not to renew her contract and of her right to a hearing before the

board, and by appearing with her attorney at the hearing to contest the charge of wilful neglect of duty, the teacher "was accorded the usual elements of procedural due process." id.

III

THE PETITIONER WAS AFFORDED NOTICE AND A MEANINGFUL OPPORTUNITY TO RESPOND TO THE CHARGES DURING A FULL BOARD HEARING AND A DE NOVO CHANCERY COURT PROCEEDING PRIOR TO TERMINATION

The Petitioner acknowledges that under the Tennessee Teacher Tenure Act, he is entitled to a *de novo* hearing. In fact, he received two *de novo* hearings in this case. Since the Tennessee Teacher Tenure Act provides that the order of the Board is suspended pending determination by the *de novo* hearing, Cooper was not terminated at the conclusion of the Board's hearing. As such, Cooper was entitled to and did receive a pre-termination hearing before an impartial Chancery Court judge prior to his actual discharge. In fact, the Tennessee Supreme Court permitted Cooper an additional *de novo* hearing when it remanded the case in part to the Chancellor for another hearing. Cooper remained under suspension pending the outcome of this second *de novo* hearing.

Petitioner refers to the case of *Matthews v. Harney County, Oregon School District No. 4*, 819 F.2d 889 (9th Cir. 1987), as holding that due process required that the discharged teacher be provided with "a meaningful pre-termination hearing, regardless of the adequacy of the post-termination procedure she received after her dismissal." Petition at p. 20.

Matthews, a public school teacher, was dismissed after she allegedly interfered with a drug investigation by the School Superintendent. She was brought before two Boards on charges stemming from the incident. The High School Board, which first considered the charges, held its meeting in executive session and

while in executive session, received evidence by way of interviews from students and parents. The Board then met with Matthews and gave her the option of either resigning or being fired. Matthews agreed to resign but then withdrew her resignation. She was directed to attend a special meeting of the Board. At that meeting, the Board again went into executive session and, after returning to open session, voted to dismiss Matthews. At p. 892. Matthews was given a written statement of reasons for the dismissal and advised that she could request a hearing. Matthews requested and received a hearing. At the end of the evidentiary hearing, the Board voted unanimously to affirm its earlier decision to dismiss. Later the Elementary School Board met and ratified the High School's termination of Matthews. Matthews requested a hearing from that Board. The Elementary Board held an evidentiary hearing and reaffirmed the action of dismissing Ms. Matthews.

Matthews did not contest the evidentiary hearings nor the adequacy of the post-termination procedures she received after her dismissal. She did contest the "pre-termination" hearing as constitutionally inadequate.

The Court held, in light of the facts, that a jury could find that the initial meeting with Matthews was "meaningless as a pre-termination opportunity to respond" because the Board had already voted to dismiss Matthews. At p. 893. In reversing the District Court's summary judgment in favor of the School Board, the Court stated that "[u]nder *Loudermill*, with respect to her property interest claim, Matthews should have received formal notice of the charges against her, an explanation of the evidence against her, and an opportunity to respond prior to the board's decision to terminate her employment." At p. 894.

The Petitioner's description of the facts to the effect that Matthews' "discharge was subsequently upheld after evidentiary hearings before both boards," (Petition at p. 20) does not take into consideration that those evidentiary hearings were not

attacked by Matthews in the Court case. Instead, it was the closed hearing wherein the decision was reached to terminate Matthews without first giving her notice of the charges or an opportunity to respond during the hearing, that came under attack and failed to meet due process requirements. Again, the court closely reviewed the facts surrounding the procedure provided and concluded from those facts that procedural due process had been denied. The issue was not whether Matthews received a "meaningful" pre-termination hearing as indicated by the Petitioner. Rather, the denial of due process was the result of the denial of the two essential elements: (1) Matthews received no *notice* prior to hearing; and, (2) since the meetings were held in executive session and she was not permitted to attend, Matthews received no *hearing* whatsoever prior to termination.

The cases referred to above have been explained in great detail to demonstrate that the decision of the Tennessee Supreme Court in this case is not inconsistent with the holdings of those cases from Circuits other than the Sixth Circuit which have addressed the issues of bias or prejudice in the decision-making body, or the elements of arbitrary and capricious behavior on the part of a decision-making body in termination of employment cases. The decision of the Tennessee Supreme Court in this case protects the constitutional due process rights of public employees to be provided with notice and a meaningful opportunity to respond prior to termination.

IV

THE PETITIONER HAS FAILED TO DEMONSTRATE THAT THERE IS A CONFLICT AMONG FEDERAL COURTS OF APPEAL IN THE APPLICATION OF THE CONSTITUTIONAL DUE PROCESS PREREQUISITES OF *LOUDERMILL* IN CASES WHERE POST-DEPRIVATION REVIEW IS SUBSTITUTED FOR PRE-DEPRIVATION NOTICE AND OPPORTUNITY TO RESPOND

The Petitioner states that "[n]umerous Federal Courts of Appeal have recognized that post-deprivation remedies are not an adequate substitute for the meaningful pre-deprivation hearing required as a matter of due process." Petition p. 19. The Circuits are in agreement that notice and the opportunity to respond are essential requirements of constitutional due process. The Circuits also are in agreement that in the absence of exceptional circumstances as outlined in decisions of this Court, where there has been no notice of charges or opportunity to respond provided prior to termination, post-termination hearings are inherently unfair and are violative of constitutional due process guarantees. There is nothing in the decision of the Tennessee Supreme Court that is inconsistent with either of these maxims of constitutional due process.

The Petitioner indicates that--

> "[a]t least three Courts of Appeal have specifically held, contrary to the holding of the Supreme Court of Tennessee in this case, that the availability of post-deprivation remedies does not cure the due process deprivation where an employee, with a property interest in continued employment is deprived of that interest in the absence of a meaningful pre-termination hearing." Petition at p. 20.

In support of this contention, the Petitioner relies upon cases from the seventh, first, and eleventh circuits, respectively. Though

not fully explained by the Petitioner, the court in each of these cases closely scrutinized the post-deprivation procedure because there was no pre-termination hearing, and no notice provided to the employee prior to termination. The Petitioner argues that the holdings in these cases are in direct conflict with the holdings of Sixth Circuit and the holding of the Tennessee Supreme Court in this case.

In *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984), Schultz, a firefighter, received only a letter which informed him that if he did not return to work by a certain date, his employment would be terminated. The Court found that the post-deprivation grievance procedures or board hearing did not cure a violation of Schultz's due process rights. In so ruling, the Court held that "Schultz was entitled to notice and a meaningful opportunity to respond before he was terminated. If he was terminated without those protections, the constitutional deprivation was complete." At p. 237. The Court concluded that the deprivation was "a garden-variety summary dismissal, and the city could have easily complied with requirements for pre-deprivation procedures." At p. 238. Thus, *Schultz* is a case where the city denied the employee notice and a hearing before he was discharged.

In *Kercado-Melendez v. Aponte-Rogue*, 829 F.2d 255 (1st Cir. 1987), Kercado-Melendez, a school superintendent, without prior notice, received a complaint cancelling her teaching certificate and dismissing her as a superintendent. This "cancellation order" was deemed effective upon receipt, however, an appeal if filed within ten days would stay the effect of the order, substituting dismissal with a suspension pending the outcome of the appeal. Relying on *Loudermill*, the Court held:

> Kercado's opportunity to appeal the Secretary's order after being informed of the action is constitutionally inadequate; due process requires that she be given notice of the charges and an opportunity to respond before the action is taken. At p. 263.

In utilizing *Loudermill* as a guide, the Court noted further that "the Secretary was not obliged to conduct a full evidentiary hearing prior to dismissing Kercado." id.

In *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987), a police chief, without prior notice was informed by the mayor that the city council had unanimously voted to fire him. The District Court held that Fetner had suffered no constitutional deprivation because state personnel proceedings and a personal lawsuit, as post-deprivation remedies, provided adequate due process. In reversing, the Circuit Court held that "The Roanoke City Council had ample time to give Fetner notice and offer him an opportunity to be heard before they fired him." At p. 1185. The Court went on to remark, "Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable." At p. 1186.

Petitioner's remarks that the holding of the Tennessee Supreme Court in this case is in conflict with the three cases cited above is a gross misstatement of the holding in this case and of the holdings in those cases. The essential due process requirement of an opportunity to be heard at a meaningful time and in a meaningful manner was recognized in each of the three cases and was directly relied upon by the Tennessee Supreme Court in this case. The reason for contrasting results exists in the obvious fact that in this case Cooper was provided notice of charges and an opportunity to respond before the action was taken as required by *Loudermill* and as found lacking by the Courts in *Schultz*, *Kercado-Melendez*, and *Fetner*.

Notwithstanding, the fact that the above cited cases involve factual situations where employees were afforded no pre-termination hearings, the Petitioner has selected these cases to convey the appearance of a conflict among Circuits on the issue of bias at the pre-termination level and whether such bias may be cured through a post-deprivation hearing. The Petitioner draws the distinction in the following manner:

> However, at least three Circuits, including the Sixth Circuit which includes the State of Tennessee, have heldthat bias of a decisionmaker at the pre-termination level is irrelevant where post-deprivation remedies are available." Petition at p. 21.

In *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987), cited by the Petitioner as in conflict, the Fifth Circuit Court determined that the police captain discharged in connection with criminal violations, received, "much more process than simply notice and an opportunity to respond." At p. 714. The Court noted that Schaper was advised of the proposed dismissal, given a list of reasons for the decision and provided an opportunity to object to the decision. Perhaps, most significant from the pre-termination aspect, Schaper received a hearing, with counsel and witnesses permitted, before he was actually discharged from the police force. See p. 714. The Court, relying on *Loudermill*, determined that at the pre-termination level elaborate proceedings were not mandated. However, "the suostantial property interest one has in not being deprived of a livelihood requires a full hearing after termination." At p. 716.

In *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987), a prison warden alleged civil rights and procedural due process violations after receiving a five day suspension for insubordination. The Court closely examined the facts leading up to the decision to suspend Garraghty and concluded that Garraghty had received sufficient due process protections. The Court utilized the balancing test in *Loudermill*, and found that Garraghty received sufficient notice and was afforded an opportunity to respond to the charges. The Court held, "Due process principles did not require that a neutral decisionmaker, rather than Jordan [the superintendent], make the decision to suspend Garraghty. A pre-deprivation proceeding need not be a full evidentiary hearing with witnesses and a neutral decisionmaker so long as the employee is given an opportunity to answer the charges." At p.

1302. The Court explained this holding in light of the facts of the case presented to it.

> "The deprivation caused by a short-term suspension when balanced with the government's interest in expeditious and effective discipline and the administrative burden of providing a neutral decisionmaker for every routine suspension, does not warrant pre-deprivation proceedings before a neutral party." id.

While its principles are sound, the facts in *Garraghty* are not comparable to this case where Cooper received full and timely notice of charges, a full evidentiary hearing, a complete *de novo* review of the decision and a review by the Tennessee Supreme Court of all facts and procedures utilized in the findings.

The Petitioner relies heavily upon the case of *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), cert. denied, 109 S.Ct. 1535 (1989), in attempting to demonstrate a conflict among circuits. In *Duchesne*, a Chief Building Inspector was advised that he was being terminated for several reasons, including "improper conduct." Duchesne's attorney requested a pre-termination due process hearing upon receiving notice of termination. When the City Manager refused to reinstate Duchesne pending the hearing, Duchesne filed suit in federal district court. Thereafter, Duchesne received a written description of the reasons for discharge and a pre-termination hearing took place over several days. Duchesne was represented by legal counsel and given an opportunity to present witnesses and to cross-examine adverse witnesses. The City Manager who terminated Duchesne presided over the hearing, testified against Duchesne and after the hearing reaffirmed the discharge.

In reversing the district court decision calling for a "neutral decisionmaker", the Sixth Circuit Court relied heavily upon *Loudermill*. The Court took particular note of the fact that this Court, in *Loudermill*, had accepted its (the Sixth Circuit's) reasoning regarding the distinctly different purposes of a

pre-termination presentation and a later formal hearing to adjudicate facts. See discussion at p. 1006-1007. "The *Loudermill* majority deliberately chose not to include within its definition of pre-termination hearing rights the panoply of trial-type hearing rights advocated by Justice Marshall, which included a full evidentiary, adversary, adjudicatory hearing with an impartial judge." At p. 1007. The Court later noted, "We acknowledge that there may be cases--perhaps this is one of them--in which the supervisory official is so biased that the *Loudermill* "right-of-reply" process is meaningless. The full post-termination, adversary, trial-type hearing will serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee". At p. 1008.

The Petitioner's reliance upon *Schaper*, *Garraghty*, and *Duchesne* does not demonstrate a conflict among federal courts of appeal on the issue of meaningful pre-deprivation notice and opportunity to respond versus full trial-type hearings provided as post-deprivation relief. In the cases cited by the Petitioner where post-deprivation hearings were deemed constitutionally inadequate, the employees were not afforded notice or an opportunity to respond prior to termination. In the cases relied upon by the Petitioner to indicate that post-deprivation hearings may be constitutionally proper, the appellate court found in each case, from the facts in the record, that the employee was afforded due process protection in the form of notice and an opportunity to respond prior to termination.

Even if the Petitioner were able to demonstrate some inconsistency in the applications of *Loudermill* in *Schaper*, *Garraghty* and *Duchesne* in comparison to other Circuits, the instant case is not the case in which those inconsistencies should be more closely examined. This case provided a full range of due process protections to the Petitioner at a meaningful time and in a meaningful manner. The Tennessee Supreme Court has applied properly the dictates and guidelines set forth by this Court in *Loudermill* and it has closely examined the facts in the record to

conclude that, not only were due process protections afforded to the Petitioner but also, the findings of both the Board and the chancery court giving rise to the dismissal of the Petitioner were "in full accord with the preponderance of the evidence." (At A-4).

Petitioner has not demonstrated a connection between the holding in the *Duchesne* case and the facts of this case. While the holding of *Duchesne* sets forth that a neutral decisionmaker is not required and that post-termination review is sufficient to rectify any faults in the pre-termination process, *Duchesne* is still not on point with the facts in Cooper. In this case, Cooper received a full evidentiary hearing *before* a decision by the board. Cooper was not terminated, but suspended pending review by the chancery court. The chancery court conducted a *de novo* review of the decision and based upon the facts found that Cooper was subject to dismissal. Cooper has not demonstrated that the board was biased, only that it had a combined responsibility, under statute, to initiate, investigate and adjudicate charges against teachers within its school system.

The Petitioner's remark that the outcome of the hearing was "pre-determined" (Petition at p. 24) ignores the facts in the record to the effect that Cooper had a hearing on previous charges which resulted in those charges being dismissed and Cooper being returned to his post as principal. It also ignores the extensive deliberations by the twelve member Board wherein there were a number of individual findings upon the charges presented to the Board. Further the remark "that Cooper's opportunity to respond 'was nothing more than a sham'" (Petition at p. 23) reveals Cooper's shallow treatment of the facts. For Cooper to consider as "a sham" a process wherein he received a full evidentiary hearing before the board, a *de novo* review by a state chancery court, a review of procedures and facts by the Tennessee Supreme Court and a second *de novo* hearing with an additional opportunity to present evidence to the chancellor, is to ignore the tenet that due process is not geared toward a specific

outcome, and in turn, to assert to the contrary that where a certain result has not been achieved, due process has not been afforded.

"Due process, as this Court has repeatedly held, is a term that 'negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*. 367 U.S. 866, 895, (1961) 81 S. Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961)". *Hortonville*, supra., at p. 494. The Petitioner appears to advocate an inflexible application of due process such that anytime any individual member of an administrative agency may develop a preconceived notion of the facts in a discharge matter, notwithstanding the fact that the individual is only one of many on a board which will make a collective decision, and notwithstanding the fact that the decision of the Board is subject to *de novo* review by an impartial judicial tribunal, the process becomes so constitutionally tainted as to void the entire process. Certainly this is not the intention of this Court in requiring notice and an opportunity to respond at a meaningful time and in a meaningful manner. Nor does it appear to be the intent of the decisions of federal courts of appeal when they apply the *Loudermill* standard to the individual facts and circumstances which confront them in the individual cases before them. (See also *Brasslett v. Cota*, 761 F.2d 827 (1st Cir., 1985; *O'Brien v. DiGrazia*, 544 F.2d 543, 546-547 (1st Cir., 1976) cert. den. sub nom *O'Brien v. Jordan*, 431 U.S. 914 (1977); *Perkins v. Board of Directors*, 528 F. Supp. 1313 (1981), AFF'd, 686 F.2d 49 (1st Cir. 1982).

CONCLUSION

The Petitioner submits that the Tennessee Supreme Court is oblivious to his due process rights and declares the same to be "of no consequence". At p. 24. Then, to support his argument that *Cooper I* and *Cooper II* have far reaching effects, he states that those decisions are --

> a license to school boards to run roughshod over the constitutional rights of tenured teachers without fear of consequence. School boards, as well as other administrative bodies that adjudicate, need not provide any semblance of a meaningful hearing to those who appear before them, even where property rights protected by the Fourteenth Amendment are at stake. (Page 25, Petitioner's Writ).

Petitioner needs to ask Ms. Turk how roughshod school boards are allowed to run over tenured teachers' rights. Petitioner needs to inquire of Frances Marie Williams how lax and indifferent the Tennessee Supreme Court is toward the teachers' rights under the Tennessee Teacher Tenure Act. See *Williams v. Pittard*, 604 S.W.2d 845 (Tenn. 1980). Petitioner should ask Elayne Sanders if the Tennessee Supreme court recognizes the property rights of tenured teachers. *Sanders v. Vinson*, 558 S.W.2d 838 (Tenn. 1977). Petitioner would do well to call Hildred Wagner and ask her if the Supreme Court of Tennessee recognizes such legal doctrines as due process, notice, and the right to be heard. *Wagner v. Elizabethton City Board of Education*, 496 S.W.2d 468 (Tenn. 1973). Stated simply, the far reaching effect of *Cooper I* and *Cooper II* extends no further than ***Mr. Cooper's*** insubordination, inefficiency, neglect of duty and incompetency.

The Writ should be denied.

Respectfully submitted,

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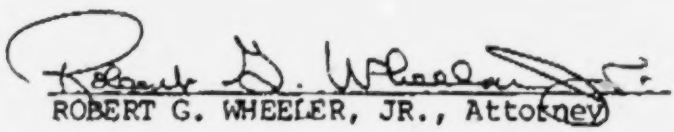
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been placed in the United States Mail, first-class postage prepaid, addressed to W. Ovid Collins, Jr., Richard L. Colbert, and Charles Hampton White, Attorneys for the Petitioner, at their offices at Cornelius & Collins, Suite 2900, Third National Financial Center, P. O. Box 2808, Nashville, Tennessee 37219, phone number (615) 244-1440, the last address of Cornelius & Collins known to me, on this the 15th day of April, 1991.



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